Nos. 80-289 & 80-692

APR 8 1981

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
and
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.,
Respondents
and
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether employer and employee representatives on trust funds created in accordance with § 302(c)(5) are collective bargaining representatives within §8(b)(1)(B) and elsewhere in the Act so as to preclude a union from forcing an employer to participate in a multiemployer trust fund with a preselected trustee-representative.

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STATUTORY PROVISIONS INVOLVED

This case involves the National Labor Relations Act, as amended, 29 U.S.C. §§ 152 and 158 (hereinafter referred to as § 2 and § 8 of the Act); the Labor Management Relations Act of 1947, 29 U.S.C. § 185 and 186 (hereinafter referred to as § 301 and § 302 of the Act or LMRA); and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501 (hereinafter referred to as § 501 of the LMRDA). This case also involves the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104-1108 (hereinafter referred to as

ERISA §§ 404, 406, 407 and 408). This case also involves the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1209 (hereinafter referred to as the Multiemployer Pension Plan Amendments Act).

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit correctly upheld the National Labor Relations Board's (Board) Petition to enforce its findings that the United Mine Workers of America, Local No. 1854, and United Mine Workers of America (hereinafter the Petitioners or Union) had, among other things, unlawfully struck to force the Employer to participate in multiemployer bargaining in violation of § 8(b)(1)(B). The Board and the Court also found that the Union had committed numerous other refusal-to-bargain conduct in violation of § 8(b)(3) of the Act. These violations included findings that the Union had refused to meet and bargain with the Belle Ayre Mine,[1] owned and operated by Amax Coal Company, a division of Amax, Inc. (hereinafter Employer or Amax); that the Union had unlawfully insisted Amax select as its bargaining representative and be bound by negotiations controlled by a multiemployer association (the Peabody group), whom the Employer believed was unwilling to adequately represent the best interest of the Employer and its Belle Ayre employees; that the Union had insisted upon various contract clauses contained in its other multiemployer association negotiated agreements, which clauses were non-mandatory and/or illegal subjects of bargaining; and that the Union had engaged in an unlawful strike in order to force Amax to accede to the union's demands. Central to and consistent with the Union's unlawful demands and strike to force

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[1] The Belle Ayre Mine commenced mining operations in 1973. (Jt. App. 33) Prior to the time a representative complement of employees were hired at the Belle Ayre mine, the employer agreed to the Union's request for a separate sub-bituminous agreement with the specific understandings that Belle Ayre mine was a separate bargaining unit and that in 1974 Amax would negotiate a separate agreement for the Belle Ayre mine. (Jt. App. 76)

Amax to select as its bargaining representative (and to be bound by a multiemployer association the Employer felt was unwilling or unable to adequately represent it and its Belle Ayre employees interests), were the Union's demands that the Employer also participate in multiemployer trust funds developed and controlled by an entirely different collective bargaining agreement, a different bargaining unit and different employer association (the Bituminous Coal Operators Association also known as the BCOA), which the Employer believed was unable to adequately represent its employees and the Employer's best interest in the Belle Ayre mine bargaining unit. Furthermore, participation in the multiemployer trust funds required the Employer to accept the trustee designated by the BCOA. Amax, for its Belle Ayre mine barganing unit had proposed retirement and health and welfare programs which offered its employees better benefits than those provided by the Union plans. Notwithstanding this, the Union refused to consider these better proposals and adamantly insisted that the Employer be bound by trust agreements under a collective bargaining agreement negotiated by a different bargaining unit, namely the BCOA. Not only was this designed to force Amax to be bound by whatever other associations negotiated in other bargaining units, it deprived Amax of its right to select its own representative in dealing with the impor-

tant terms and conditions of employment relating to pensions and health insurance.[2]

In order to fully appreciate the issues in this case the following factual circumstances are set forth:

1. The Union had a collective bargaining agreement with another bargaining unit, namely the Bituminous Coal Operators Association (BCOA) (hereinafter called the BCOA Agreement or Wage Agreement).

2. Amax, pursuant to a different Board unit certification, was negotiating a separate and different agreement with the Union. All during these negotiations, the Union was bargaining under protest and continued to claim Amax was bound by the Association Agreement.

3. At the same time that Amax Belle Ayre unit was negotiating with the Union, the Union and BCOA were negotiating *new trust agreements,* called the 1974 Benefit Trust and 1974 Pension Trust (hereinafter called the UMW Trusts).

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[2] To appreciate the inequity and injustice to the Employer and its Belle Ayre unit employees averted by Amax's insistence on refusing to participate in the UMW Funds and to be bound by the BCOA Agreements pertaining thereto, it need only be noted that those funds reduce benefits for all of the participants because of the short fall in funding caused by the "wildcat" strikes in the BCOA bargaining unit—something neither the Employer or its Belle Ayre unit employees were responsible for, nor could they have done anything to stop, prevent or remedy. This further illustrates a reason why participation in multiemployer bargaining cannot be compelled and why one bargaining unit should not be compelled to be bound by another's agreement. Otherwise, employees and employers in one unit can suffer substantial disruptions in terms and conditions of employment while at the same time being powerless to avert or remedy the problem or even participate in discussions of solutions. To so deprive the employers and employees of their collective bargaining rights regarding such major benefits is completely contrary to all of the policies of the Act not the least of which is that expressed in § 9(b) that the best way to "assure employees the fullest freedom in exercising rights guaranteed by this Act, . . ." is by letting each unit settle and handle its own labor disputes.

4. The new UMW Trusts were based solely on the provisions of the BCOA Agreement; and the terms of the UMW Trusts were to effectuate the provisions of the BCOA Agreement.

5. The BCOA-appointed trustee and the Union-appointed trustee on the UMW Trusts were unable to act for the sole and exclusive benefit of Amax's Belle Ayre unit employees while at the same time acting solely and exclusively on behalf of the BCOA unit employees because, in many respects, the interests of the employees under the UMW Trusts and the BCOA Agreement were adverse to that of the Employer and its employees. For example, the Union was demanding that Amax contribute substantial sums to the 1950 benefit trusts in which no Belle Ayre employees would ever participate or benefit since no "employees" were involved in the 1950 funds.

6. The UMW Trusts are part of the BCOA Agreement and give the trustees broad authority and powers; to wit, the authority to negotiate and agree on royalty rates and contributions, to select and set criteria for acceptable insurance carriers, to investigate disputed claims, to establish consistency in plan coverage and in the awarding of claims, to adjust and settle disputes arising under the provisions of the Wage Agreement relating to their area of responsibility, to require employers to cease doing business with unacceptable insurance carriers, to interpret, apply and enforce compliance with the terms and objectives of the plans that are included in the contract, to enforce the contract and to settle, adjust and compromise claims arising thereunder, and to determine whether provisions of the BCOA Agreement have been breached and/or are to be enforced and make such changes in the Plans and Trusts as they deem to be necessary or appropriate.

7. During negotiations, Amax proposed its own benefits and pension plans, which provided employees with better benefits, at a lower cost, and proposed reciprocity (i.e., portability) with the Union funds. The Union deferred to

the trustees of the UMW Trusts who rejected Amax's proposal regarding reciprocity and portability.[3]

8. Amax refused to participate in the UMW Trusts without equal representation on the trust funds and further objected to having its Belle Ayre unit employees benefits controlled or undermined by actions of the BCOA and Union representatives on the UMW Trusts whose interests were adverse.

With these cogent facts as a backdrop, Amax submits that the trustees of the UMW Trusts are clearly collective bargaining representatives under § 8(b)(1)(B) of the Act and that Amax could not be compelled, absent its agreement, to participate in the multiemployer trust fund; nor to waive its right to select its own representative for the purpose of administering such important benefits by being forced to agree to an already-designated management trustee.

Since the Employer and Union trustee-representatives engage in collective bargaining and the adjustment of grievances in the course of their duties of carrying out the functions of the trust and collective bargaining agreement, the Union's strike to force Amax to participate in the multiemployer trust fund with the predesignated representatives restrained and coerced Amax in the selection of its representative for collective bargaining purposes.

Employer representatives and employee representatives on joint trust funds do not lose their representational status by virtue of their appointment as trustees. The duties and

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[3] The Petitioners' argument saying that multiemployer § 302(c)(5) trusts are less costly, provide better benefits than single employer trusts or are necessary to ensure portability are totally unsupported by the record in this case. The record demonstrates the single employer plan rejected by the Union was better, was as portable, was more financially secure and less costly than the UMW Trusts.

functions performed as trustees are, in large measure, that of agents for their respective appointing party. This agency relationship has been long recognized and regulated by the Board and courts.

Further, the fiduciary obligations of such employer and employee "representatives" are not inconsistent with their roles as representatives or agents of the appointing parties. While such "representatives" owe a fiduciary duty to the trust beneficiaries ("the employees of such employer, and their families and dependants"), this is only one aspect of their status. The Employer and employee representatives have definite and frequently different views on contributions, distributions, and on other matters concerning the interpretation and application of the Trust and the collective bargaining agreement and the settlement and adjustment of claims and disputes arising thereunder. On these decisions, the fiduciary obligations are not compromised; rather, they are a plateau upon which bargaining-type decisions are made by the trust representatives. This premise was recognized by Congress when it set forth in § 302(c)(5) that there was to be equal representation and if the employer and employee representatives are unable to resolve a dispute and there are "no neutral persons" on the fund empowered to break the deadlock, this statutory scheme required that it be submitted to a "neutral or "impartial umpire" to decide such dispute.

ERISA did not change the previously existing common law duty that all trustees had to act in a prudent manner with respect to the interest of and for the sole and exclusive benefit of the employees of "such employer, and their families and dependents"; nor was it intended to remove the trustee from his representative or agency relationship. To the contrary, ERISA § 408(c)(3) recognizes that a trustee may also be an officer, employee or representative of a

party in interest. In this context, the Congressional intent of both the LMRA and ERISA has been effectuated. The Multiemployer Pension Plan Amendments Act of 1980 has not changed this relationship.

ARGUMENT

I.

TRUSTEES ON § 302(c)(5) TRUST FUNDS ARE REPRESENTATIVES WHO CAN ENGAGE IN COLLECTIVE BARGAINING.

The thrust of the Petitioners' and amicus' position is that the trustees appointed to § 302(c)(5) trust funds cannot be representatives of the parties appointing them because they have a sole, exclusive, and individual fiduciary obligation to the beneficiaries of the funds. In other words, it is the argument of the Petitioners and their amicus that trustees do not and cannot "wear two hats", one hat as a representative of the party appointing them and another hat as a fiduciary. The Petitioners contend that the Court of Appeals' decision recognizing that trustees "wear two hats" is in direct conflict with § 302(c)(5), ERISA and the common law duty of trust fiduciaries.

From the logic syllogism, which requires a major and minor premise, the Petitioners' position fails completely. The question of fiduciary — statutory or common law — does not even aspire to a minor premise; it is a non-issue! The major premise and the threshold question is: Is a trustee a representative who acts in response to or in the interests of the party appointing him? By statutes, by NLRB decisions, and by courts decisions, the answer is an unequivocal *YES*.

Section 302 makes it unlawful for an employer to make payments to employees or representatives of employees except as specifically authorized by law. Subsection (c) contains the exception:

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of *such employer,* and their families and dependents . . . : *Provided,* that . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and *employees and employers* are equally represented in the administration of such fund, *together with such neutral persons* as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the *two groups* shall agree on an *impartial umpire to decide such dispute,* or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement. (Emphasis added)

The term *representatives* as used throughout § 302, has a clear meaning, both in the legislative history and the case decisions.

The language of § 302(c)(5) does not change the reference to or meaning of the term *representatives*. To the contrary, the language emphasizes that the trust fund is "established by *such representatives*", that the employees and employers are equally represented, and in the event of a deadlock among the representatives, an impartial umpire is to be selected by them to resolve the dispute.

Persons selected or appointed to the trust funds are the representatives of the parties appointing them. The Petitioners maintain that the persons being appointed are not representatives, but rather are fiduciaries solely to the trust beneficiaries. It is respectfully submitted that the Petitioners' position is without factual, practical or legal foundation. The totality of the circumstances dictate the capacity of the fund appointee. These circumstances include: (1) the context of negotiations, and (2) the provisions of the trust agreement and the powers and discretion given the trustees.

It has been said that § 302 trusts come in different varieties — some trusts limit the scope and authority of the trustees while others provide the trustees with considerable discretion. *See* C. Lambos, *Welfare and Pension Plans: Policing the Trustee: The Law Governing Labor - Management Employee Benefit Funds* in Symposium on Labor Relations Law 611-47 (R. Slovenko ed. 1961). The welfare and pension trusts in the instant case fall within the latter category.

Although the UMW welfare and pension trust funds were modified through negotiations of the 1974 trust instruments, the trustees still have broad powers and, where the decision-making powers are not given the trustees by the trust instruments, the trustees are required to look to the parties creating the trust (and/or appointing the trustees) to give them the necessary power to make the decisions.

The UMW Trusts reserve to the parties the power to amend, and also provide the trustees with the right to amend. (Jt. App. 98q-r)

In the setting that the UMW Trusts provide for actions of the trustees that are not exclusively for the beneficiaries, which is discussed in detail below, we turn to the totality of the circumstances that provide the answer to whether the trustees of the UMW Trusts are representatives.

A. The Negotiations Between The Union And Amax Demonstrate That The Trustees Are Representatives Who Participate In Collective Bargaining.

The record below established that the Union, among other violations, unlawfully insisted that Amax (1) designate a multiemployer association as its representative, and (2) as held by the Court of Appeals, agree to participate in a § 302(c)(5) fund controlled by another bargaining unit.

Permitting unions to coerce employers into multiemployer benefit funds controlled by representatives of other bargaining units is contrary to the entire statutory scheme of the National Labor Relations Act which mandates bargaining in and for appropriate units. To allow this would transfer a major share of bargaining over a mandatory subject from the bargaining table in one unit to that of the other. This could subordinate the interests of the employees in one unit to that of the other against their will and right to seek their own solutions through collective bargaining and representatives of their own choosing. In addition to subordinating their interest to that of the other unit which may in fact be adverse to the financial interest of the subordinated group, it also deprives the employer of its right to bargain through representatives of its own choosing.

Amax not only refused to be forced to accept a representative not of its choosing (i.e., the multiemployer association), it also refused to be forced to accept participation in the UMW Trusts, which were controlled by representatives of a different bargaining unit, where it

would have no voice, representation or protection against decisions directly and indirectly affecting Amax and its Belle Ayre employees. Instead, Amax sought to negotiate its own collective bargaining agreement and its own employee benefit plans and trust. (Jt. App. 99-123, 175-186, 187-209, 210-222, and 283-297) These plans and trust offered greater benefits to employees than the UMW plans. (Jt. App. 224-239) The Union, however, refused to consider Amax's proposed plans and trust and continued to insist on Amax's acceptance of the UMW Trusts, including the predesignated trustees (even though the Union was negotiating the new trusts with BCOA — the 1974 Benefit Trust and 1974 Pension Trust).

The Petitioners point out that health and welfare and pension plans are mandatory subjects of bargaining and the Union had the right to insist to impasse on its proposals. But that argument misses the mark. While it is hard to understand why the Union would strike for a lesser benefit than offered to its employees—the issue was not and is not whether it was a mandatory subject, but whether Amax had to give up its right to select who its representatives would be; and that is a permissive subject. Further, it is submitted that such insistence is unlawful when it is for a specific trust where the trustees can bind the Employer to collective bargaining agreement changes through trustee collective bargaining actions. To illustrate the trustees collective bargaining authority, the UMW Pension Trust proposal, Article XX, Sec. (d)(2) (Jt. App. 98k-98l), specifically authorizes the trustees to establish various royalty rates for coal (i.e., negotiate and agree). If Amax was part of this plan, Amax would then be required to pay these royalty rates and would have no voice in a change directly affecting a fringe benefit contribution.

Moreover, under the UMW Trusts, the trustees could apply these royalty rates to leased or licensed out lands and Amax could be liable. Further, Amax could be required to apply these royalty rates to coal purchased from non-union

employers. See *Mullins v. Kaiser Steel Corp.*, 105 L.R.R.M. 2579, ____ F.2d ____ (D.C. Cir. 1980), *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229 (9th Cir. 1979), and *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), where the courts held that the defense on the bases of § 8(e) (union signatory clause) and antitrust was not available to employers in a suit by the trustees to enforce the trust agreement. Since Amax was resisting the leasing and licensing out, enabling and other union signatory clauses, these cases reinforce Amax's right to take lawful steps to *properly* raise its defenses to unlawful clauses as required by the courts and not wait for the trustees collection action as well as protecting its interest in resisting the trustees' collective bargaining action of imposing royalties on coal produced by and/or purchased from lessees/licensees or non-union employers.

During negotiations, Amax proposed its own Pension Plan and Trust and sought to insure complete portability to employees, proposed a reciprocity agreement with the Union or if that was unacceptable, a Trust worth one year vesting, much better than the 10-year vesting provided in the UMW Trust plan. The Union, however deferred to the UMW Trust trustees, who rejected Amax's negotiations proposal. (Jt. App. 64-66, 83-84, and 92-96). Thus, the trustees actually engaged in the collective bargaining negotiations. This negotiating role is emphasized by the trust fund's previous grant of reciprocity to other employers who were not parties to the BCOA Agreement. (Jt. App. 93-94).

Therefore, the negotiations, coupled with the language, terms and conditions of the UMW Trusts and the actions by the Union representatives and the trustees, demonstrate that the trustees are representatives engaging in collective bargaining and not solely fiduciaries.

B. The Trust Agreements Permit Trustees Wide Discretion And Action That Are Collective Bargaining In Nature And Scope.

Courts have candidly acknowledged that the relationship

between employer and employee trustees of a multiemployer plan is quasi-adversarial in nature and that the trustees function not only as fiduciaries for the beneficiaries of the plan, but also serve as representatives of the parties who appoint them.

The Court of Appeals for the Third Circuit has recognized that the requirement that trustees act as representatives is central to the Congressional scheme set forth in § 302. In *Associated Contrators of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977), the court stated:

> The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. See *Lamb v. Carey*, 162 U.S.App.D.C. 247, 498 F.2d 789, 793 (1974); *Toensing v. Brown*, 374 F.Supp. 191 (N.D.Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of view of employer and employee as a distilling process which would provide safeguards against trust fund corruption.

559 F.2d at 227-28.

The powers and discretion of trustees, as well as their relationships with their appointing parties, are discerned from both the collective bargaining agreement and the trust instruments. In the instant case, the various agreements proposed by the Union are set forth in the Joint Appendix. These include:

Joint Exhibit 2 - Article XI - Sickness and Accident Benefits (Jt. App. 97-98d)

Joint Exhibit 2 - Article XX - Health and Retirement Benefits (Jt. App. 98e-98x)

Joint Exhibit 14(b) - United Mine Workers of America 1974 Pension Plan, Effective December 6, 1974 (Jt. App. 241-269)

Joint Exhibit 14(c) - United Mine Workers of America 1974 Pension Trust (Jt. App. 270-282)

The provisions of these proposals demonstrate that the trustees have collective bargaining functions, that they are not exclusively fiduciaries, and that the Union's position was to compel Amax to forego representation by accepting irrevocably the BCOA-appointed trustee (and the BCOA Agreement) as Amax's "employer" trustee.

As set forth above, at the same time the Union was attempting to force Amax to accept a multiemployer association as its collective bargaining representative and to accept the UMW Trusts, the Union and BCOA were negotiating and establishing new trusts for health and retirement benefits. The 1974 Pension Trust was to be interpreted and applied as per the Wage Agreement and, according to Article I(2) of the Trust (Jt. App. 271), an Employer was defined as "an employer who is signatory to the Wage Agreement." (*See also* Jt. App. 245) The contributions were to be paid solely by employers in accordance with Article XX of the Wage Agreement. (Jt. App. 266) These contribution terms require the employer to pay the Trusts on a

cents-per-ton-of-coal basis. (Jt. App. 98g-98m) The coal included both coal produced by the employer or "after production by another operator, [coal] procured or acquired by such Employer for use or for sale on which contributions to the appropriate Trusts as provided for in this Article have not been made . . . ." (Jt. App. 98i) This means that under the Wage Agreement clauses regarding leased, subleased and licensed lands, *all* employers who procure or acquire coal from a lessee, sublessee, licensee or non-union employer would be required to pay contributions. (*See* subsection 7, Jt. App. 98m) Any employer failing to pay these contributions would be subject to enforcement action by the trustees, whose only obligations are through the Wage Agreement and Trust Agreement. (Jt. App. 98o)

Amax was resisting all of the leasing, subleasing, licensing, and assignation clauses as being illegal union signatory clauses, which resistance was in large part upheld by the Board and Court of Appeals. However, with the Wage Agreement and Trust Agreement provisions, Amax could have been in violation of these Agreements. To be required to accept the BCOA appointed-trustee, Amax was being forced to forego representation while at the same time being required to accept a foreseeably adverse representative.

This same conflict would also persist because Amax refused to pay contributions for the 1950 funds since none of Amax's employees were participants or beneficiaries. (Jt. App. 34, 46, and 94 in paragraph B) Here, again, the clear terms of the trust agreement require such payments. If the trustees were exclusively fiduciaries, they would have to enforce the requirement against Amax. However, the Union assured Amax that it would not have to pay contributions for the 1950 trust. (Jt. App. 94 in Paragraph B) By such action, the Union was binding the trustees to this specific change for Amax only and the trustees would have to forego enforcement, which can only mean that the trustees would be acting as representatives of the appointing parties.

The UMW Trusts set forth many specific duties of the trustees that can only be characterized as collective bargaining. For example, as noted earlier in this brief, the trustees are to establish the royalty rates to be paid by the employers on certain coal (Jt. App. 98k-98l); and the trustees are to determine the insurance carriers and plans, based upon criteria that the trustees determine, with the list of carriers being revised "at the discretion of the Trustees" and upon notice to the employer, the employer must cease doing business with any trustees-disqualified carrier. (Jt. App. 98b-98d) Such authority to choose, select and eliminate insurance carriers and non-conforming plans is clearly an extension of the collective bargaining process, and the trustees' power to investigate, reject and allow claims cannot be distinguished from the collective bargaining process of adjusting grievances. Moreover, the trustees must determine where the plans, trust agreements or the bargaining contract itself have been breached or violated and then pursue all legal remedies. (Jt. App. 275-276) The trustees further determine the eligibility or ineligibility of pension beneficiaries whose right to receive benefits has been challenged. (Jt. App. 98q) Here again, the trustees resolve and adjust "grievances."

The UMW Trusts also provide for amendment of the Trusts, which means the trustees *must* agree. For example, Article XX, Section (d) sets forth in pertinent part:

> At any time *during the term of this Wage Agreement, the Employers [who are signatory to the Wage Agreement] and the Union* may agree upon a reallocation of contributions to be paid. . . .

(Jt. App. 98j) (emphasis added). (The right of amendment is also set forth at Jt. App. 246 and 265.) These reservations of amendment rights reduce the independent capacity of the trustees. The trustees are bound by such amendments, both to the trust instrument as well as *changes in the plans. Robinson v. United Mine Workers of America Health and Retirement Funds*, __ F.2d __, 106 L.R.R.M.

2441 (DC Cir. 1981) Note, however, that Amax would have no participation right because it is not a member of BCOA and is not a signatory to the BCOA Wage Agreement.

The foregoing recitation of the various provisions of the Trusts demonstrate the vast discretion of the trustees. The exercise of this discretion is an extension of the collective bargaining process. This is accentuated by Article XX, Section (h)(5), wherein it states:

> The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

(Jt. App. 98q)

These are illustrations of the collective bargaining authority and wide-ranging discretion entrusted to the trustees. The trustees interpret, apply, administer and "enforce" the provisions of the funds and the provisions of the collective bargaining agreement in no less important, but probably more significant, a role in the administration of the agreement than union "stewards" or company "supervisors"; they are even empowered to set and determine contributions to the Trusts.

It is obvious, then, that the trustees have broad, discretionary authority. The employer-trustee representative status assigned under § 302 is for the specific purpose of making sure that the trust fund representatives properly make decisions which are of major importance to the employer, the coal industry, as well as the beneficiaries represented through their Union. *Blankenship v. Boyle*, 329 F.Supp. 1089, 1095 (D.D.C. 1971). The facts that (1) trustees are bound by changes and decisions of the Union and BCOA and (2) the Union and BCOA are bound by changes and decisions by the trustees clearly demonstrate that the trustees are collective bargaining representatives and are not solely fiduciaries, as alleged by the Petitioners.

C. Section 302(c)(5) Required Equal Representation And Requires Appointment By The Respective Appointing Party.

By enacting § 302, Congress intended to prohibit payments by employers to employees, employee organizations and officers or representatives of such organizations except under specified conditions. Congress also intended that the establishment and administration of union funds providing health and welfare and pension benefits for employees be closely regulated. Congress removed the union funds from the exclusive control of unions by requiring employers to be equally represented in and responsible for the administration of the funds.

The legislative history of § 302 confirms the intent of Congress that employers have a coordinate responsibility to the funds. As Senator Taft stated:

> This amendment [Section 302] provides that the employees and employers must be equally represented in the administration of the fund, together with such neutral persons as they may agree upon. In the event of a deadlock the agreement shall be submitted to an impartial umpire.
>
> The purpose is to prevent the abuse of welfare funds.

2 Legislative History of the Labor Management Relations Act, 1947, at 1312 (1948) *citing* 93 Cong. Rec. 4875, 4877 (1947). Senator Morse, an opponent of the amendment, stated:

> Employees and employers must be equally represented in the administration of the fund, and in the event of disagreement between them, machinery is provided for the settling of such disputes. In other words, it requires employer participation in the funds and in the administration of the funds.

2 Legislative History, *supra*, at 1317-18 *citing* 93 Cong. Rec. 4881.

The representation intended by Congress in enacting § 302(c)(5) was to provide oversight of the funds by employer representatives in order to prevent the misuse or abuse that might occur if the funds were left exclusively to the union control. *See Arroyo v. United States*, 359 U.S. 419, 426 (1959). See also Cox, *Some Aspects of the Labor Management Relations Act*, 61 Harv.L. Rev. 274, 314 (1948), where Professor Cox refers to the employer's representative as a "watchdog" of the funds.

In *United States v. Ryan*, 350 U.S. 299 (1956), the Court construed § 302 and stated that the term "representatives" must be construed liberally to give meaning to its context in labor-management relations. This meaning is applicable as well as in the instant case. A trustee is a representative of the party appointing him. And under § 302(c)(5)(B), it requires equal representation.

The responsibility (or the corollary right) mandated by § 302(c)(5)(B), for Amax to oversee the administration of a jointly-administered trust which Amax was being forced to accept, would not have been met by designating irrevocably the BCOA-appointed trustee as Amax's trustee. This takes on greater significance because only signatories to the Wage Agreement have a voice and Amax was negotiating a collective bargaining agreement with major differences in terms and provisions from the Wage Agreement. To allow the Union, in any degree, to force the BCOA-appointed trustee to be Amax's trustee is unlawful under § 302. *Blassie v. Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965).

Congress' intent in § 302(c)(5) is not fulfilled if Amax, under different terms and provisions, is deprived of its opportunity to "choose" to give up its right to select its representative in the funds. As Justice (then Judge) Blackmun set forth in *Blassie*, 345 F.2d at 72:

> The whole contemplation of [Section 302] is that the employers who are entitled to representation in the administration of the fund are those who make their contributions because of their subjectability to collective bargaining with the union as a union. If others not in this category choose to contribute, they take their representation as they find it. Further, to permit the union in any degree to participate in the choice of employer representatives does violence to the statutory standard of equal representation.

In addition, in order to fulfill the equal representation requirement of § 302(c)(5)(B), there must be relatively equal rights of appointment and recall of the union and employer trustees.

To permit the Union to literally select, or in the words of the U.S. District Court in the case of *Mobile Mechanical Contractors Ass'n v. Carlough*, 456 F.Supp. 310, 326 (S.D. Ala. 1978), "by choosing the choosers of the trustees", the Union participates to an impermissible degree in the selection of Amax's trustee and violates § 302.

D. The Dual Role Of Trustees, As Representatives And As Fiduciaries, Has Been Recognized By The Courts And Board.

Despite the arguments of the Petitioners that the Court of Appeals' decision on the trustee issue erroneously expands the capacity of trustees to bargaining representative status, the Board and courts have regularly held that trustees can, and do, act as bargaining representatives. *Whelan v. Colgan*, 602 F.2d 1060 (2d Cir. 1979); *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978); *Souza v. Teamsters Pension Trust*, 460 F.Supp. 843 (N.D. Cal. 1978); *Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Cafe, Inc.*, 588 P.2d 1334 (Wash. 1979). As noted by Walter Kolodrubetz in *Multi-Employer Pension Plans Under Collective Bargaining* - Part III, Bureau of Labor Statistics, Monthly Labor Review, April 1962, at 390:

> Multi-employer plans make room for flexibility. In a sense, the joint boards engage in continuous collective bargaining on what the pension plan can and will do. The judgment of the joint boards can be exercised in virtually all matters except the rate of employer contribution. Thus, they generally have the authority to modify eligibility requirements and the benefit structure, even for workers who have retired.[4]

For many years, the Board has held that certain § 302(c)(5) trustees and trust funds have violated § 8 of the Act by acting as agents of the parties appointing them. *See, e.g., Jacobs Transfer, Inc.*, 227 N.L.R.B. 1231 (1977) (trusts, in refusing to accept contributions, are agents of union and employer); *L & M Carpet Contractors, Inc.*, 218 N.L.R.B. 802 (1975) (trustees are agents of each party to collective bargaining agreement); *Fixtures Unlimited*, 213 N.L.R.B. 363 (1974) (union trustees are "agents" of respondent); *Turner-Brooks, Inc.*, 161 N.L.R.B. 229 (1966) (union refused to bargain through its agent, § 302 trustee); *Jones and Jones, Inc.*, 172 N.L.R.B. 2248 (1968) (trust representatives found to be § 8(b)(1)(B) representatives).

As recently as January 8, 1981, the Board found in *Warehousemen's Union Local 334, Teamsters v. The Crescent*, 253 N.L.R.B. No. 109 (Chairman Fanning dissenting), that the trustees of a § 302(c)(5) fund had acted as union representatives when they exercised their discretion under the Trust Agreement to create a vision care plan. The Board majority held that by creating the plan, the trustees, as union agents (and vice versa), had made a unilateral change in a mandatory bargaining subject, which constituted a refusal-to-bargain violation. At page 8 and note 1 of the Slip Opinion, the Board majority stated:

> If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is

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[4] In the instant case, under the UMW Trusts, the trustees have the power and authority to change or establish the rates of employer contributions.

undermined. Taken to its logical conclusion, even agreed-upon benefits have no certainty of constancy during the contract term if such benefits can be modified by means of the ploy used here. We find no sanctuary for Respondent in the Trust as our colleague does. The inference is clear, and we draw it, that Respondent's representatives were speaking with a union voice while simultaneously seeking to cloak themselves with the immunity of their fiduciary status when they engaged in conduct intended to promote union, not Trust, goals.[1]

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[1] The Board has, of course, found on numerous occasions that trustees of a Taft-Hartley trust have performed certain acts as agents for either or both of their joint settlors. See, e.g., *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977); *Local 80, Sheet Metal Workers International Association, AFL—CIO, and its Agents, etc. (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966); *J. J. Hagerty, Inc.*, 139 NLRB 633 (1962). Neither the cited cases nor our agency analysis herein contravenes Board law that trustees do not exercise the specialized agency powers of a "collective-bargaining representative." See *Sheet Metal Workers' International Asociation and Edward J. Carlough, President (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB 1238 (1978). The issue in this case is not whether the Trustees have engaged in collective bargaining *inter se*. The issue is whether the trustees' vision care plan is consistent with the terms and conditions of employment already negotiated by the recognized collective-bargaining representatives of Respondent and the Employers. If inconsistent, then a further issue, resolved through an agency analysis, concerns to whom the change brought by the Trustees may be attributed. As indicated, we would find that Respondent is responsible for the change. We note in this regard that our dissenting colleague joined in a similar finding in *Turner-Brooks, supra*, wherein the Board unanimously found a respondent union responsible for an 8(b)(3) violation committed by its agents who were trustees in the act of administering benefit trust funds.

While the Board majority's disclaimer tries by rhetoric to say they are not doing what they are doing, their actions speak so loudly it is impossible to hear. This is highlighted by Chairman Fannings's dissenting comments:

> Absent any evidence that this action of the employer Trustees was controlled in any way by the union Trustees or by Respondent, I find that implementation of the vision care plan is attributable solely to the proper exercise of independent judgment by the Trustees as a group.
>
> Nor is there any basis for concluding that the vision care plan was an impermissible subject under the terms of the Trust. To the contrary, the Trust Agreement's statement of purpose includes "providing and maintaining any employee benefit, except pension, including but not by way of limitation, life and accident, health and welfare benefits, including dental, *vision*, drugs and pharmaceutical supplies ....." (emphasis supplied.) The section entitled "Purpose of Trust" adds that "The Trustees shall, in their sole discretion, determine which benefits shall be provided." It thus appears clear that implementation of a vision care plan is within the contemplated purposes of the Trust. Especially in light of the acceptances of trust, the Charging Parties are therefore bound by the Trustees' decision to effectuate such a plan . . .
>
> Against this background, I perceive no basis for concluding that Respondent, simply because of its Trustees' interest in and urging of the vision care plan, acted unilaterally regarding effectuation of the vision care benefit, a benefit that entailed no additional employer expenditure during the existing contract, and was subject to revocation by individual employers at the next round of contract negotiations. Accordingly, I would dismiss the complaint.

Slip Op. at 18-19 (footnotes omitted).

Whether prominence is given the Board's majority or its dissent, the conclusion is clear. In finding that the trusts and/or trustees have violated the Act through conduct occurring during the internal administration of the trust, the Board has continued to recognize that the trustee-representatives and such trusts are an extension of and part of the collective bargaining process and is within the pur-

view of § 8 of the Act and that it has jurisdiction over employee benefit trust administration. Such jurisdiction is totally unaffected by the Court of Appeals' holding in the instant case.

The Courts, in recognizing that trustees "wear two hats", have most often separated actions of trustees which involve "structural matters" and those pertaining to "administrative or fiduciary matters." This differentiation is based upon actions instituted under § 302(e). The courts were faced with claims by beneficiaries seeking redress for alleged trustee breaches of fiduciary duties. The courts analyzed § 301(a) and § 302(c)(5) and (e) and the statutory basis for its jurisdiction. The development of the structural matter and fiduciary matter concepts, and the court decisions thereon, are traced in *Alvares v. Erickson*, 514 F.2d 156 (9th Cir. 1975). The court summarized this separation by stating:

> Raymond v. Hoffman, a case much like the one at bar, found § 302(e) jurisdiction without distinguishing the types of cases that might be cognizable under that section. However, based on language in *Bowers, supra*, the more recent of these cases, *Lugo, Insley, Porter*, and *Giordani*, have recognized a distinction between actions involving "structural" deficiencies in the relevant trust which cause it to violate the "sole and exclusive benefit" provision of § 302(c)(5) and actions involving only questions of day-to-day fiduciary administration of welfare and pension funds. Section 302(e), these cases say, provides jurisdiction over the former but not the latter.
>
> Accepting this distinction for the moment, we conclude that the claim of the plaintiffs in this case involves a "structural" rather than an "administrative" matter.

514 F.2d at 165.

The distinction made is that the trustees in a § 302(c)(5) trust have duties that are not exclusively fiduciary in nature. When the trustees make decisions or seek to make changes, such action is not an action of day-to-day fiduciary administration. Generally, according to the cases, this involves structural matters and of necessity involves the representative capacity of the trustees.

In *Ader v. Hughes*, 570 F.2d 303 (10th Cir. 1978), the union-appointed trustees proposed two amendments to the trust agreement. The employer-appointed trustees opposed them. As a result an "impasse" was reached. 570 F.2d at 306. The district court's appointment of an umpire was appealed by the employer-trustees and reversed by the court of appeals. In doing so the court stated:

> The distinction between ordinary and extraordinary matters made in *Bath v. Pixler, supra*, and by appellees in the trust agreement before us, is, we believe, valid. We need not attempt to draw the line, but simply recognize that one exists. The danger in allowing an umpire to determine the legal effect of a particular provision in a trust agreement is that the balance of rights and duties struck by union and employer representatives may very likely be upset by mistake contrary to the original understanding of the parties. The union trustees hope to upset the balance here, and there is nothing subtle about their attempt. They would rewrite the agreement over the united protests of the employer trustees. Thus, this is not a matter for an umpire. Whatever else may be meant by trust fund "administration," the term does not include decisions to amend or not amend a 302(c)(5) trust agreement.
>
> * * *
>
> Section 302 of the LMRA was meant to curb 'the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.' *Arroyo v. United States*, 359 U.S. 419, 426, 79 S.Ct. 864, 868, 3 L.Ed.2d 915 (1959). The statute requires a strong employer presence on the board of trustees. The employer trustees have charged that

> the amendments proposed by the union trustees would favor the unions at the expense of management. Whether the charge is true or not, it certainly is worthy of careful consideration. 'The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature.' *Association Contractors v. Laborers, supra,* at pp. 227-228. A success for the union trustees here would be a defeat for the legislative policy. We do not believe that Congress intended to see provisions born of agreement between management and labor replaced by possibly one-sided amendments that set one faction against the other. When proposals are made to change the instrument which has outlined where the parties shall stand in relation to each other, an impartial umpire is not a substitute for the veto of vigilant employer representatives.

570 F.2d at 307, 308.

The continued recognition of the dual role which trustees play is illustrated by the *Gateway Cafe* case (and cases cited therein). In this case the trustees negotiated a settlement agreement with the employer which required the employer to recognize the union as the bargaining representative. In finding that the trustees action was on behalf of the union, the court pointed out that it was not a breach of the fiduciary obligations; nor did § 302(c)(5) prohibit trustees from serving two principals.

> Where the purpose and effects of a transaction are to benefit the union and penalize employees, the transaction is not solely for the employees' benefit, and it is violative of the statutory prohibition. See Insley v. Joyce, 330 F.Supp. 1228, 1234 (N.D. Ill. 1971). Thus, though trustees are held to high standards under the LMRA, in the absence of a substantial showing that trustees have either paid money to employers or have seriously neglected or subverted the interests of trust

beneficiaries, courts should not trivially set aside their actions. Toensing v. Brown, 374 F.Supp. 191, 198 (N.D. Cal. 1974), aff'd, 528 F.2d 69, (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1311 (9th Cir. 1972).

The settlement agreement in the instant case resolved an existing employer trust fund dispute, avoided possible employer insolvency, and resulted in the continuation of the trust *for the employees' benefit.* Ultimately, the agreement requiring continued contributions to the trust could conceivably further the actuarial soundness of the trust fund. We do not believe an incidental advantage to the union, assuming such an advantage materializes, would be sufficient to defeat this benefit and make the required substantial showing of trustee misconduct. *See Lugo v. Employees Retirement Fund of Illumination Prods. Indus., supra.*

* * *

Further, we observe that had Congress wished the total independence of trustees for which appellants contend, it easily could have acted to prohibit a person from serving both as a union representative and as a trustee. But it did not do so. Rather, Congress required both employee and employer representatives to participate in administration of the trust fund. 29 U.S.C. § 186(c)(5)(B). Thus, some degree of collateral interest on the part of the respective trustees was not totally ruled out.

In this case, while respondent, acting on behalf of the trust, had some degree of collateral union interest, the facts do not demonstrate respondent acted impermissibly in administration of the trust. The terms of the agreement and its effects, do not operate in any way to penalize beneficiaries of the trust. Accordingly, we reject appellants' argument that respondent violated the fuduciary duties imposed by section 186(c)(5).

558 P.2d at 1339-40.

Whether the actions of the trustees are called "structural" or "collateral interest" or "quasi-adversarial", it means only one thing: *Trustees wear two hats—one as a collective bargaining representative and one as a fiduciary.* There is nothing wrong with this dual role. Congress recognized it and the Board and courts have given credence to it. Petitioners, in defense of their positions, ask this Court to disregard and discard the long line of Board and court decisions giving effect to the "two hats" role of trustees. We believe that this Court will not ignore the developed body of case law.

E. Section 501 Demonstrates That Congress Recognized That Collective Bargaining Representatives Can Be Both Representatives And Fiduciaries.

Section 501 of LMRDA, entitled "Fiduciary Responsibility of Officers of Labor Organizations", defines in broad terms the obligations of union officials. In particular, § 501(a) sets forth that "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." It is, therefore, the duty of the officers and representatives "to hold [the union's] money and property *solely* for the benefit of the organization and its members." (Emphasis added).

Thus, a fiduciary relationship is created by § 501, requiring union agents to act in the interests of the union and its membership. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Boswell v. IBEW, Local Union No. 164*, ___ F.Supp. ___ (D.N.J., filed January 6, 1981), BNA Daily Labor Report No. 30 (February 13, 1981). Yet those agents are clearly recognized and awarded status as "representatives" of all employees in an appropriate unit for purposes

of collective bargaining. Analogous to fiduciary duties is the duty of "fair representation" imposed on union representatives because they engage in collective bargaining and the adjustment of grievances.

Contrary to the arguments constructed by the Petitioners, § 501 demonstrates further Congressional awareness and support for the proposition that a fiduciary obligation does *not* preclude, and may complement, representative status.

II.

TRUSTEES ON § 302(c)(5) TRUST FUNDS ARE COLLECTIVE BARGAINING REPRESENTATIVES UNDER § 8(b)(1)(B) OF THE ACT.

Section 8(b)(1)(B) was finalized by Congress before § 302(c)(5)(B) was conceived.[5] Realistically, therefore, § 302(c)(5)(B) could not have been within contemplation of Congress when it debated § 8(b)(1)(B). However, the specific legislative premise for § 8(b)(1)(B) is also realistically applicable to § 302(c)(5)(B).

Section 302(c)(5)(B) was passed for the purpose, among others, of precluding the possible abuse by Union officers of the power they might achieve if welfare funds were left to their sole control. *Arroyo v. United States*, 359 U.S. 419 (1959). Senator Taft made reference to the Mine Workers Union "war chest" that could be used against employers. Congress sought to make sure that misuse or abuse of the monies or power it brought would not occur. Professor Cox referred to the employer's representative as a "watchdog" of the funds. As a result, Congress provided for the employer-appointment of representatives on trust funds. If a

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[5] Proviso (B) of § 302 was added as an amendment adopted by the Senate, 93 Cong. Rec. 4754, and accepted by the Conference Committee during the first session of the 80th Congress. Section 8(b)(1)(B) had been part of the bill passed by the 79th Congress but vetoed by the President.

union can dictate who the employer appoints as his representative, then the purpose of § 302(c)(5)(B) is subverted. This is the same premise for the enactment of § 8(b)(1)(B). Senator Taft explained:

> Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes.

2 Legislative History, *supra*, at 1012 *citing* 93 Cong. Rec. 3953-54.

The result is the same in the case of a union attempting to force an employer to accept a representative on a trust fund, which Congress mandated should have *equal representation*. There is certainly no equality if the union can mandate that the employer accept a representative not of his choice. To give the same cognizance to the appointment of a representative required by statute must be firmly within the contemplated parameters of § 8(b)(1)(B) and Congress.

In addition, the facts of this case fully support the conclusion that the UMW Trust trustees are engaged in collective bargaining and the adjustment of grievances. As set forth in the Summary of Argument and discussed in greater detail above, the trustees make collective bargaining decisions by setting contribution rates, forcing employers to do business (or not do business) with only their approved insurance carriers, enforcing terms and provisions of both the trust agreement and the collective bargaining agreement and having the authority to make changes in the plans and trusts as they deem necessary or appropriate. During the negotiations between Amax and the Union the

trustees actually made a negotiating decision on behalf of the Union. They are, therefore, engaging in collective bargaining activities clearly within the terms of § 8(b)(1)(B).

Congress sought to preclude a union from forcing an employer into a multiemployer association. In the instant case, this is exactly what the Union was trying to do with Amax. As part of this multiemployer scheme, the Union also insisted that Amax accept the BCOA-Union benefits and pension plans and trusts. Even after it finally began to bargain with Amax, they insisted upon clauses, terms, and provisions of the BCOA Agreement, which were held to be non-mandatory and/or illegal subjects for bargaining. These actions of the Union can only be interpreted as an attempt to fulfill its initial illegal position—to force Amax into an association. Such coercive action is readily cognizable within the proscription of § 8(b)(1)(B) and is not a legislative enlargement of it. The instant case is *not* in disharmony with *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790 (1974), but rather falls within its scope.

III.

NEITHER FEDERAL PENSION PLAN LAWS NOR COMMON LAW PROHIBITS TRUSTEES ON § 302(c)(5) TRUST FUNDS FROM BEING COLLECTIVE BARGAINING REPRESENTATIVES.

Petitioners argue that the trustees of the UMW Trusts are fiduciaries whose sole responsibility is to the beneficiaries and participants of the funds, precluding the fiduciaries from being collective bargaining representatives. In making this argument, Petitioners rely on various court decisions in cases which deal with factual situations involving fund administration, the statutory language in ERISA and fallacious policy arguments advanced regarding the congressional intent in passage of the Multiemployer Pension Plan Admendments Act of 1980. The fiduciary duties contained in ERISA and the common law do not preclude the fiduciary from acting in other capacities and Petition-

ers' concerns regarding the destruction of multiemployer funds, if this case is decided against them, is without foundation.

A. ERISA Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Both Petitioners rely heavily on the statutory framework of ERISA for their proposition that a trustee of a § 302(c)(5) trust cannot be both a fiduciary and a collective bargaining representative. In doing so, Petitioners contend that ERISA requires fiduciaries to administer the plan "*solely* in the interest of the participants and beneficiaries." 29 U.S.C. § 1104. However, there is *no* language in § 404 of ERISA which would prohibit the fiduciary from also being a collective bargaining representative. For that proposition Petitioners have argued that § 406(b)(2) of ERISA, which prohibits "adverse representation", would preclude such a finding. Nonsense!

An analysis of § 406 of ERISA shows that there are four types of prohibited transaction provisions: (1) specific transaction prohibitions, (2) general transaction prohibitions, (3) employer property prohibitions, and (4) fiduciary prohibitions.

Focusing on the non-fiduciary prohibitions, each of these contain in its statutory language an absolute direction not to use plan assets either in a contractual situation with a party-in-interest or to use them in a manner which would either impair those assets' value to the plan or benefit a party-in-interest. The statutory language of § 406(a) of ERISA speaks in terms of plan property being sold, exchanged, leased, or loaned to a party-in-interest, regardless of whether or not value was received. There are in addition, prohibitions, unless qualified under § 407 of ERISA, against

the fiduciary causing the plan to hold either employer securities or real estate. None of these prohibited transactions contained in § 406(a) of ERISA would prevent the fiduciary from also serving as a collective bargaining representative.

Section 406(b) of ERISA contains the fiduciary prohibitions and is the statute Petitioners rely on for the proposition that a fiduciary may not "wear two hats". Specifically, Petitioners argue that § 406(b)(2) of ERISA, which provides that "a fiduciary shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan," prevents the fiduciary from being a collective bargaining representative presumably because the nature of his representation would always be adverse. This view is *not* a correct statutory interpretation.

First, both Petitioners failed to direct this Court's attention to ERISA § 408(c)(3) which provides that "*nothing* in § 406 shall be construed to prohibit any fiduciary from ... serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party-in-interest." (Emphasis added) There is no Congressional intent evidencing what our legislators were contemplating when this provision was enacted or how they intended it to interface with § 406 of ERISA. However, it may have been that Congress did not feel compelled to discuss wording whose ordinary meaning is clear. "Nothing" means precisely that.

Second, the adverse representation provision of § 406(b) operates to prohibit a fiduciary from acting only in those situations involving transactions. Although the meaning of "transaction" is broad, guidance as to its use in § 406(b) can be garnered by examples of transactions contained in § 406(a). In that section, "transaction" refers to sales, exchanges, leasing, transfer of services, goods or facilities or more simply stated, as commercial arrangements. Applying the doctrine of ejusdem generis, the general term "transac-

tion" in § 406(b) should include and cover only those transactions of the same general nature as found in the specific terms in § 406(a). Therefore, § 406(b) only operates when a commercial arrangement is involved. This interpretation is consistent with Petitioners' cited congressional intent of preventing fiduciaries from being put in a position of divided loyalties because the opposite sides of any commerical transaction are by necessity adverse.

The Department of Labor has taken the position that service in dual capacities, without more, does not result in a prohibited transaction under § 406(b) in Advisory Opinion Letter 76-15. This Opinion involved a fiduciary of a plan who was a member of a committee which had the authority to appoint an investment manager. That fiduciary was also on the board of directors of the company which was chosen as the investment manager. The Labor Department stated that a fiduciary is not subject to § 406 of ERISA merely because he continues to serve as a director of the company appointed as investment manager, warning that an adverse representation situation may arise depending on the facts and circumstances. The Department of Labor has ruled similarly in Advisory Opinion Letters 76-62 and 77-47. The Board (NLRB Br. at 30-31, n. 20) would have this court believe that § 408(c)(3) only clarifies § 406. If so, what has been clarified? Amax respectfully submits that the clarity exists in the fact that the fiduciary may be a collective bargaining representative of either the union or the employer.

The Department of Labor regulation, 29 C.F.R. § 2550.408b-2(e)(1), provides:

> If the furnishing of office space or a service involves an act described in § 406(b) of the Act (relating to acts involving conflicts of interest by fiduciaries), such an act constitutes a separate transaction which is not exempt under § 408(b)(2) of the Act. The prohibitions of § 406(b) supplement the other prohibitions of § 406(a) of the Act by imposing on parties in interest who are fiduciaries a duty of undivided loyalty to the plans for which they act. These prohibitions are im-

> posed upon fiduciaries to deter them from exercising the authority, control, or responsibility which makes such persons fiduciaries when they have interests which may conflict with the interests of the plans for which they act. In such cases, the fiduciaries have interests in the transactions which may affect the exercise of their best judgment as fiduciaries. *Thus, a fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause* a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service. Nor may a fiduciary use such authority, control, or responsibility to cause a plan to enter into a transaction involving plan assets whereby such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) will receive consideration from a third party in connection with such transaction. A person in which a fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary includes, for example, a person who is a party in interest by reason of a relationship to such fiduciary described in § 3(14)(E), (F), (G), (H), or (I). (Emphasis added).

The regulation indicates that fiduciaries may find that they could, if they act, be committing a breach of a fiduciary prohibited transaction. The solution recommended by this regulation is simply for the fiduciary not to exercise his authority. At least by negative implication, the Department of Labor has recognized that the fiduciary may have dual capacities and that when a conflict arises such fiduciary may not "act" if his only loyalty is not to the plan. There are no implications that a person cannot be or continue to function as a fiduciary in other circumstances. Even if both

the union and employers seek totally independent fiduciaries, conflicts will still arise in the course of fund administration.

Both Petitioners give little or no recognition to the case, *Curren v. Freitag*, 432 F.Supp. 668 (S.D. I11. 1977), the holding of which is directly on point. In *Curren*, a trustee of a § 302(c)(5) trust was also the Director of Labor Relations for a signatory employer association. Curren actively represented certain member employers of the association in resisting trust audit and collection efforts because such efforts were merely brought to apply pressure during pending labor negotiations. The issue before the court was whether the advice rendered by Curren as the Director of Labor Relations constituted acting on behalf of or representing an adverse party within the meaning of § 406(b)(2) of ERISA. In holding that Curren had not breached his fiduciary duty by giving advice to an adverse party the court stated:

> To effect the broad reading of § 1106(b)(2) sought here by counterplaintiff would require a fiduciary who also serves as an employee of a party in interest as permitted by § 1108(c)(3) to neither inform nor counsel his employer of his opinion of the propriety of actions taken by the fund. In short, such person would require a bifurcated personality. As a fiduciary, the actions of his co-fiduciaries must be known and acted upon but he would be required to remain silent and inactive in his capacity as an employee of a party in interest.
>
> This construction appears to me to be unreasonable and unworkable especially in light of the provisions of the Labor Management Relations Act pursuant to which this particular fund was established which requires employees and employers to be equally represented in administering the Fund. 29 U.S.C. § 186(c)(5)(B).

> A preferable construction, it seems, would prevent the fiduciary from being placed in a position where he was dealing with the Fund on behalf of his employer in a matter concerning the assets of the Fund. "Dealing" in this context should mean that the fiduciary is possessed with the power to compromise the positions of his employer, or the Fund or both. For example, the act should prohibit a fiduciary who was appointed by the contractors' association from being placed in a position which would authorize him to accept on behalf of the Fund, an amount less than the amount due the Fund in settlement of a Fund claim against an individual contractor. On the other hand, the act should not prohibit a fiduciary from counseling the individual contractor that the Fund might accept less than the full amount due in settlement of a Fund claim. *In other words the act must be construed to differentiate between advocating a course of action or a solution and having the power to take that course or implement that solution.*

432 F.Supp. at 672 (emphasis added).

The *Curren* case demonstrates that fiduciaries have dual capacities which are permissible under ERISA. The case is also useful in bringing to this Court's attention the fact that more often than not employees of employer associations and union business agents sit as trustees of the § 302(c)(5) trusts. *Accord, Culinary Workers & Bartenders Union No. 596 Health & Welfare Trust v. Gateway Cafe, Inc.*, 588 P.2d 1334 (Wash. 1979).

The Third Circuit Court of Appeals recognized the facts and circumstances involved in the instant case. Their opinion should not be reversed based on straw grasping ERISA arguments that have no bearing in a case involving structural deficiencies in establishing the trust.

Last, the holding in *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979), demonstrates how the duties a fiduciary has under § 302(c)(5) of the Act and ERISA may be reconciled. In *Cutaiar*, the trustees were deadlocked over whether the

pension fund should loan money to the welfare fund to which they were also trustees. Pursuant to § 302(c)(5) of the Act, an impartial umpire was appointed. The umpire ruled the loan permissible. After the loan had been made, the Secretary of Labor informed the trustees that the loan violated the adverse representation standards of ERISA because a borrower and a lender in the same transaction are always adverse. The trustees thereafter sought a declaratory judgment that the Secretary's letter was null and void. In upholding the Secretary's opinion the court stated:

> We have no doubt that the pension fund's loan to the welfare fund falls within the prohibition of § 406(b)(2). Fiduciaries acting on both sides of a loan transaction cannot negotiate the *best* terms for either plan. By balancing the interests of each plan, they may be able to construct terms which are fair and equitable for both plans; if so, they may qualify for a § 408 exemption. But without the formal procedures required under § 408, each plan deserves more than a balancing of interests. Each plan must be represented by trustees who are free to exert the maximum economic power manifested by their fund whenever they are negotiating a commercial transaction.

590 F.2d at 530 (emphasis supplied).

But employer and employee representatives on trust funds are not on both sides of a transaction when representing employees or employers in making sure their beneficiaries' interests are protected.

The Court's further statement in response to the trustees' defense that they had relied on the good faith is dicta and unsupported by the law. Even at common law trustees could not be on both sides of a transaction without running afoul of the duty of prudent conduct all trustees had to adhere to long before the passage of ERISA.

B. The Common Law Of Trusts Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Petitioners further rely on common law trust principles in the administration of the funds to attempt to refute Amax's contention that the trustee/fiduciaries may also be collective bargaining representatives. Petitioners further contend that an adverse decision will cause the Board to have jurisdiction over the everyday operation of the trusts. Both of their contentions are incorrect.

As previously-cited decisions of the Board, set forth at p. 20 of this Brief disclose, the Board does have jurisdiction over § 302(c)(5) trusts when they run afoul of § 8 of the Act. Since the Board has always had jurisdiction to remedy discriminatory and unlawful action by trustees, their point is simply irrelevant and out of touch with reality. Why compliance with the Act by trust funds and their trustees should cause any difficulty is not known. Such trusts must comply with many other laws including ERISA. Various provisions of the Internal Revenue code have affected their operations, for example.

Petitioners contend that under the common law, since a fiduciary has a duty of undivided loyalty to the fund, he may not also be a collective bargaining representative.

Petitioners' reliance on various cases are inapposite and not authoritative in this instant case. In *Blankenship v. Boyle*, 329 F.Supp. 1089 (D.D.C. 1971), the court enjoined "the trustees" from Fund operations which afforded advantages to the Union. The injunction however, was granted in the context of a found breach of fiduciary duty. The court did not describe the obligations of trustees under § 302(c)(5) of the Act.

In *United Marine Division, Local 333 v. Essex Transportation Co.*, 216 F.2d 410 (3d Cir. 1954), the language indicating that certain trustees were not representatives of the employees was used in connection with a finding by the

court that a promise to make payments to the trustees of a trust by an employer which was not a party to the trust was not within the prohibitions of § 302(a) and (b) of the Act.

Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), involved a suit alleging coverage under a § 302(c)(5) trust. The issue before the court was whether the trustees' interpretation of the trust was arbitrary and capricious. The Court, without careful analysis, in dictum (footnote 5) and relying on *Essex Transportation*, supra, dismissed that claim but, in effect, recognized the dual role of trustees.

Petitioners also rely heavily on *Toensing v. Brown*, 374 F.Supp. 191 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1975), which supports their case not at all. In *Toensing*, plaintiffs argued that the trustees of a § 302(c)(5) trust violated the sole and exclusive benefit rule of § 302(c)(5) by increasing retirement benefits for persons retiring after July 1, 1971, while not increasing benefits to retirees who retired before that date. In holding for the trustees, the district court stated, in response to plaintiffs' argument that the trustees must be completely independent, that:

> Indeed the implication of plaintiffs' position seems to be that if the trustees' actions are clearly consistent with and further the interests of the union and employers, those actions are suspect even if they are actuarially sound and otherwise consistent with the interests of the beneficiaries of the trust fund. If only such complete independence of the trustees had been sought however, Congress would not have enacted § 186(c)(5) in its present form. That section requires that employees and employers be equally represented in the administration of the trust fund. It does not prohibit a person from serving both as collective-bargaining representative and as trustee of the trust fund. Congress intentionally placed the trust fund provisions within the collective bargaining context,

> believing that the trust fund was best managed when the contending views of employer and union were resolved in the best interests of the beneficiaries.

374 F.Supp. at 195 (emphasis supplied).

Aside from case law, Petitioners cite several secondary sources. Although Amax believes Petitioners have erroneously focused their arguments on the administration of the trust rather than its structure, the *Restatement (Second) of Trusts* is not without reference to the possible dual capacity of trustees. The *Restatement (Second) of Trusts* § 170(2) (1959) provides:

> The trustee in dealing with the beneficiary on the trustees' own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.

Even under common law such dealings were required of a trustee. This section indicates, or at an absolute minimum implies, that a trustee, although under a duty of loyalty, may act in other capacities.

Petitioners cite *Lamb v. Carey*, 498 F.2d 789 (D.C. Cir.), *cert. denied*, 419 U.S. 869 (1974), but it does not do anything more than establish the importance of the representative capacity of § 302(c)(5) representatives and their dual roles. In this case, trustee Carey was replaced by the union as its representative trustee in the UMW Trusts, absent a showing of wrongdoing, simply because he did not cooperate with the new union leadership. This case establishes that a relationship exists between a trustee and the appointing party.

C. The Multiemployer Pension Plan Amendments Act of 1980 Does Not Prevent Trustees From Being Collective Bargaining Representatives.

Regardless of Petitioners' arguments[6] that Congress specifically disapproved of the decision in the instant case and regardless of the Union's argument that by allowing this decision to stand, the Court would be putting multiemployer plans in jeopardy, Congress in amending ERISA did not make it illegal to withdraw from these multiemployer plans. Furthermore, the Union implies (Union Br. at 27) that independent signators may in fact be able to enter cheaper, or more aptly put, more cost efficient plans if they withdraw. This brief has already brought to the Court's attention that Amax proposed a better single employer plan. Never has Congress evidenced any intention to require employers to maintain participation in inefficient plans solely to protect their integrity.

Multiemployer plans will not collapse if employers through collective bargaining withdraw either wholly or partially. In either instance the withdrawing employer would have to fund the unfunded vested benefits. *See* §§ 104, 108(c) & (d). Congress has also provided for a "free look" so that employers may enter multiemployer plans and later withdraw if found unsatsifactory. Congress has been and probably will continue to have concern about such plans as long as they continue to accumulate sizable assets or pursue unwise funding. But the case at bar will not jeopardize participation in the plans. A holding affirming the Third Circuit Court of Appeals' decision will support the salutary policies of the Act by encouraging bargaining on a unit-by-unit basis rather than forcing labor relations disputes on another unit; while at the same time depriving the

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[6] Statements made by members of Congress years after enactment of § 302 and ERISA have very little, if any, authoritative status. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Romeo Community Schools v. HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

other of some measure of control over the selection of its representatives and voice in its own solution of its own collective bargaining disputes. To overturn the decision of the Third Circuit will result in an invitation to strong bargaining units to overwhelm the significance of appropriate units and the right of employers to select their own bargaining representatives—two of the linchpins in our national free collective bargaining policy.

CONCLUSION

The courts, federal and state, have recognized that:

> A Section 302 trust fund does not fit the categories of an ordinary trust and to that extent is *sui generis* and thus requires compliance with the objectives of Section 302.

Alvares v. Erickson, 514 F.2d 156, 166 (9th Cir. 1975). As a unique kind of trust, the usual principles or requirements of trust law cannot be readily superimposed. Congress clearly recognized that union representatives were trustees and nothing in the enactment of § 302(c)(5) was to deprecate their union status. Instead, Congress intended equal employer representation on the trust. Thus, there was clear recognition by Congress that the trustees automatically had collateral interests.

For the Petitioners to represent to this Court that the trustees "are solely fiduciaries owing undivided loyalty to the beneficiaries of such a plan" (NLRB Br. at 9) is without foundation in fact, practice, or law. The decisions of the Board itself refute such a statement. Moreover, the Board's attempt to distinguish its decisions (NLRB Br. at 42, n. 29) is a contradiction in terms and actions. In *The Crescent* case, as the dissenting Chairman Fanning makes clear, the trustees were exercising their discretionary functions in the internal administration of the trust. Yet, the Board majority found that the union trustees were acting as union

representatives while they were exercising these discretionary functions. Thus, the Board's argument that trustees are not representatives within the ambit of § 8 of the Act is not in keeping with Board decisions.

Where, as in the instant case, the trustees have wide discretion, such as the right to structurally change the trust agreement, to make decisions regarding employer participation, rates, contributions, and carriers, to adjust grievances, and where the trustees have actually participated in the collective bargaining negotiations, the trustees are representatives within the real meaning of representation under the Act. And where Amax is negotiating a significantly different collective bargaining agreement from the BCOA Agreement, with different health and pension plan terms, but where the *new* trusts are based exclusively on the BCOA Agreement which is at odds with Amax's agreement, the BCOA-appointed new-trust trustee cannot properly or adequately represent Amax.

For the reasons set forth above, there is no basis for this Court to reverse the Court of Appeals. There are no conflicts between the Courts of Appeals in the subject matters. Likewise, there are no conflicts between or within the federal statutes. In essence, the arguments advanced are grounded upon the Board's and the Union's disagreement with the Court of Appeals' correct interpretation and application of the pertinent statutory provisions and case law.

It is submitted that the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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